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No. 79-630

In The

# Supreme Court of the United States

OCTOBER TERM 1979

NELSON BUNKER HUNT, HERBERT HUNT, AND LAMAR HUNT,

*Petitioners,*

*v.*

COASTAL STATES GAS PRODUCING COMPANY, AND COASTAL STATES MARKETING, INC.,

*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

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COASTAL STATES GAS PRODUCING COMPANY, AND COASTAL STATES MARKETING, INC.,

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## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

NELSON BUNKER HUNT, HERBERT HUNT, and LAMAR HUNT petition for a Writ of Certiorari to review the judgment of the Supreme Court of Texas which affirmed the decisions of the lower courts.

## OPINIONS BELOW

The opinion of the Supreme Court of Texas is reported at 583 S.W.2d 322 and is reproduced in the Appendix at A-1. The opinion of the Court of Civil Appeals for the Fourteenth Supreme Judicial District at Houston is reported

at 570 S.W.2d 503 and is reproduced in the Appendix at C-1. The judgment of the 133rd Judicial District Court of Harris County, Texas is not reported but is reproduced in the Appendix at D-1.

## JURISDICTION

The judgment of the Supreme Court of Texas was rendered on June 13, 1979, and Petitioners' timely Motion for Rehearing was overruled by the Court without opinion on July 18, 1979. This Petition for Writ of Certiorari is filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 2101(c), as amended.

## QUESTIONS PRESENTED

1. Whether the courts below erred in holding that the act of state doctrine bars Petitioners' claim when there was an "unambiguous agreement regarding controlling legal principles" and when a foreign government engaged in a "commercial" activity and breached its commercial obligations to Petitioners.

2. Whether the courts below erred in holding that the Hickenlooper Amendment to the Foreign Assistance Act of 1964, 22 U.S.C. § 2370(e)(2), does not apply in this case and that the act of state doctrine bars judicial recognition of Petitioners' claim.

3. Whether the courts below erred in holding that the act of state doctrine bars Petitioners' claim because the Bernstein exception applies and permits judicial recognition of Petitioners' rights.

4. Whether the courts below erred in holding that Libyan law alone is determinative of Petitioners' rights and that



Petitioners had only a "contractual" right to oil produced from a concession owned and developed by Petitioners because international law applies by its own force in this case, because the choice-of-law provision of the Libyan concession rules out Libyan law as the governing law of the agreement, and because, under any applicable system of laws, Petitioners had a "right to property."

5. Whether this Court should reassess or refine the act of state doctrine.

## STATUTE INVOLVED

As amended, the Hickenlooper Amendment to the Foreign Assistance Act of 1964, 22 U.S.C. § 2370(e)(2), provides:

> Notwithstanding any other provision of law, no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right to property is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of that state in violation of the principles of international law, including the principles of compensation and the other standards set out in this subsection: *Provided*, that this subparagraph shall not be applicable (1) in any case in which an act of a foreign state is not contrary to international law or with respect to a claim of title or other right to property acquired pursuant to an irrevocable letter of credit of not more than 180 days duration issued in good faith prior to the time of the confiscation or other taking, or (2) in any case with respect to which the President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States and a suggestion to this effect is filed on his behalf in that case with the court.

## STATEMENT OF THE CASE

This case involves a claim of conversion by Hunt[1] against Coastal States,[2] a subsequent converter. It arises out of the Libyan Government's expropriation in 1973 of Hunt's interest in a Libyan oil field and involves several millions of dollars in damages. Although the material facts of this controversy are undisputed, their legal consequences are not.

By deed dated December 18, 1957, the Government of Libya (by and through its Petroleum Commission) granted Nelson Bunker Hunt Concession No. 65 in the Province of Cyrenaica, Libya (Appendix F-1). This Concession was in the form prescribed by and incorporated as a part of Libya's Petroleum Law No. 25 of 1955. By the terms of the Concession, Hunt was granted:

> the exclusive right for a period of fifty years to carry out geological investigations, including aerial surveys, and to search for by any other means, bore for, and extract petroleum within and over the [concession] area * * * [and] the right to take away such petroleum whether by pipeline or otherwise from the concession area and to use, process, store, export and dispose of the same.

(Appendix F-3)

Shortly thereafter, Herbert Hunt and Lamar Hunt agreed with their brother, Nelson Bunker Hunt, that in consideration of their payment of 12½% each of the expenditures

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[1] Petitioners, NELSON BUNKER HUNT, HERBERT HUNT, and LAMAR HUNT, will be referred to herein sometimes collectively in the singular as "Hunt."

[2] Respondent, COASTAL STATES MARKETING, INC., is a wholly-owned subsidiary of Respondent, COASTAL STATES GAS PRODUCING COMPANY (Appendix E-9). Respondents will be referred to herein in the singular as "Coastal States."



incurred in connection with Concession No. 65, they would each receive 12½% of the profits derived therefrom. On June 24, 1960, Hunt assigned an undivided one-half interest in Concession No. 65 to BP Exploration Company (Libya) Limited ("BP"), an English corporation. This assignment was approved by the Libyan Government in September 1960.

In November 1961, oil was discovered in the area covered by Concession No. 65 (sometimes called the "Sarir Field"). At enormous expense, Hunt and BP developed the Sarir Field by drilling wells, constructing physical facilities thereon, and by laying a pipeline to Marsa-al-Hariga/Tobruk, Libya; on January 12, 1967, they began to sell oil produced from the Sarir Field (Appendix E-7). This production continued until the events hereafter described. During this time, Hunt and BP paid royalties and taxes to the Libyan Government as provided in the concession agreement.

On December 7, 1971, the Libyan Government (without prior notice) passed a law purporting to nationalize the operations of BP in Concession No. 65 and to transfer BP's rights in Concession No. 65 to the Arabian Gulf Exploration Company ("AGECO"), a newly-created joint stock company owned entirely by a commercial agency of the Libyan Government (Appendix E-8). BP was the only concessionaire expropriated on that date, either in whole or in part (Appendix E-8). Following BP's expropriation, AGECO assumed BP's position in the operation of Concession No. 65 and marketed BP's portion of the oil.

BP promptly and vigorously protested this action. It published notices in newspapers throughout the world of its continuing claim to Sarir Field crude oil and sent notices of its claim to individual companies which might deal in

such oil. In fact, Coastal States received one of BP's notices.[3]

On May 24, 1973, representatives of AGECO informed Hunt's representative in Benghazi, Libya, that no further oil would be delivered for Hunt's account. This *de facto* expropriation was followed on June 11, 1973, by the passage of Libyan Law No. 42 of 1973 (Appendix G-1). This law purported to nationalize "The rights of Nelson Bunker Hunt in Oil Concession Agreement No. 65 . . . and ownership of all the funds, rights, assets and shares of Nelson Bunker Hunt in said concession shall revert to the State . . . ." The statute further provided that "[a]ll the funds, rights and assets of Nelson Bunker Hunt . . . shall be assigned to the Arabian Gulf Exploration Company [AGECO] . . . [and] [t]he Arabian Gulf Exploration Company [AGECO] shall replace Nelson Bunker Hunt in so far as his rights and obligations in Oil Concession Agreement No. 65 are concerned. . . ."

On that same day, the head of the Libyan Government, Chairman Mu'ammar al Qadhdhafi, declared:

> The United States, which believes it is dominating the world with its oil monopolies, aggressive military bases and fleets, and which continues to provoke the peoples fighting for their freedom and independence — we say with a loud voice that this United States needs to be given a big hard blow on its cold insolent face in the Arab area.
>
> * * *

[3] Following the Libyan expropriation of Hunt's rights in Concession No. 65 (hereafter described), BP joined Hunt in this litigation. BP subsequently settled its controversy with Libya by an agreement dated November 20, 1974, and, having originally been a plaintiff in this suit, withdrew its claims against Coastal States in accordance with the terms of its settlement agreement.



> The time has come for the Arab peoples to confront the United States. The time has come for the U.S. interests to be threatened earnestly and seriously in the Arab area, regardless the cost. The U.S. haughtiness and imperialist arrogance is manifested in a number of challenges to the Arab nation. . . . However, the time may come, if it has not already come, for the serious and dangerous confrontation to take place . . . with the oil companies and with the entire U.S. imperialism.
>
> On this occasion, the RCC of the Libyan Arab Republic has decided to nationalize the American oil company Bunker Hunt.

(Appendix H-7-8)

Hunt was the only concessionaire who was expropriated, either in whole or in part, on that date (Appendix E-8). *See* the Statement by the Department of State on Policy on "Hot" Libyan Oil (Appendix K-6-14).

The Libyan confiscation of Hunt's property was, therefore, in violation of international law, *i.e.*, it was arbitrary, discriminatory, malicious and ordered for political reasons unrelated to any legitimate public purpose. In addition, there was no provision in the expropriation decree for payment of prompt, adequate and effective compensation to Hunt; Hunt's compensation (if any) was to be established solely by Libyan government officials (Appendix G-3-4).[4]

This expropriation of Hunt's property was condemned by the United States Government. In its Note Verbale No. 59 to the Libyan Government, dated July 5, 1973, the United States Department of State recognized that the Libyan expropriation of Hunt's property was in violation of international law and should not be recognized. The Note stated:

[4] Hunt was partially paid (for physical assets expropriated, not for oil produced or to be produced) by Libya approximately two years after the expropriation and the institution of this suit (Appendix E-9).

> The United States Government has now had the opportunity to review the public statement by the Chairman of the Revolutionary Command Council on June 11, 1973, and the official commentary accompanying Law No. 42 of the same date. It is clear from those pronouncements that the reasons for the action of the Libyan Arab Republic Government against the rights and property of the Nelson Bunker Hunt Oil Company were political reprisal against the United States Government and coercion against the economic interests of certain other U.S. Nationals in Libya. Under established principles of international law, measures taken against the rights and property of foreign nationals which are arbitrary, discriminatory, or based on considerations of political reprisal and economic coercion are invalid and not entitled to recognition by other states.

(Appendix I-3)

Following this communication, the State Department sent a letter dated August 3, 1973, to G. Henry M. Schuler, a Hunt employee. The letter stated:

> I am enclosing the text of the substance of the note and will provide you with certified copies of the complete texts as soon as they are available. We have no objection to your using this note in connection with any pending or proposed litigation or in any other way appropriate to the assertion of your legal rights to the nationalized property.

(Appendix J-3)

Subsequently, the Statement by the Department of State on Policy on "Hot" Libyan Oil was issued (Appendix K-1). It stated, in part:

> It was the conclusion of the Department of State, in light of the illegal nature of the nationalization of Hunt and the implications which that action had for the interests of other U.S. Nationals in Libya, and elsewhere, that the U.S. Government could and should take certain steps to support the Hunt Company's position. Hunt, and its concession partner, BP, should, it was thought, pursue their legal remedies wherever possible since a failure to do so would encourage the Libyan Government to continue its policy of expropriating foreign oil companies in violation of international law. Having determined that the nationalization on June 11 was invalid under international law, it was believed that it was important for the U.S. Government to assert that position on behalf of the Hunt Company, a U.S. national, in an attempt to make it as difficult as possible for the Libyan Government to profit by its unlawful acts. The leverage that Hunt, and the U.S. Government, could bring to bear on Libya was limited; an important element of it was legal action in pursuit of "hot" oil.
>
> * * *
>
> As noted, the State Department is of the view that the Libyan nationalization decrees of June 11, 1973, and September 1, 1973, are violative of international law. The June decree was discriminatory, arbitrary and not for a public purpose; the September decree made an offer of inadequate compensation and also failed to respect the obligation to arbitrate disputes with concession holders. In these circumstances, and having regard to the foreign policies pursued by the Libyan Government and the state of relations between the Libyan and the United States Governments, it was and remains highly unlikely that the Executive Branch would find it appropriate to request courts in the United States to refrain from passing upon acts of the Libyan Government on grounds of "act of State". . . .
>
> * * *
>
> In pursuing the foregoing approach, the Department of State has been influenced not only by the view which the Congress manifested in adopting the Sabbatino Amendment that it should take a benign attitude to-

wards suits brought in pursuit of "hot" products. It also has been influenced by the will of the Congress, manifested in more than one piece of legislation, that the Department of State should vigorously protect American foreign investment.

(Appendix K-10, K-19-20, K-23)

Following the seizure of his property, Hunt openly and publicly maintained that the expropriation violated the contract between the parties and international law and could not be given effect. Hunt published notices in newspapers throughout the world and also gave individual notice to persons and corporations arranging for the purchase of crude oil (or the products of crude oil) derived from Concession No. 65. Indeed, notification of Hunt's claim was given to Coastal States.

Subsequent to the Hunt expropriation, Coastal States, pursuant to contracts with AGECO (the commercial agency of the Libyan Government) and in disregard of the notices it had received, took possession of Sarir Field crude oil (Appendix E-8). Coastal States subsequently transported the crude oil to a refinery in Italy where it was refined in accordance with a Processing Agreement between Coastal States and the refinery (Appendix E-8). Following processing, products derived from the Sarir Field crude oil were sold to third parties by Coastal States. Some of these products were taken from the Italian refinery and were brought to the United States (Appendix E-8). Coastal States contends that it did not transport or cause to be transported any of these products to the United States. Although Coastal States' role in these matters is disputed by Hunt, it is undisputed that the proceeds of the sales of these products did accrue to Coastal States and its subsidiaries which are all incorporated and headquartered in the United States (Appendix E-9).



On August 8, 1973, Hunt brought this conversion action against Coastal States in the 133rd District Court of Harris County, Texas. Hunt's claim, in summary, was that the Libyan Government confiscated his property in violation of the agreement between the parties, international law, and the public policy of the United States; that such an illegal confiscation could not, and did not, affect Hunt's rights, including his right to recover from converters any petroleum extracted from Concession No. 65; and that Coastal States acquired such petroleum and exercised dominion and control over such with full knowledge of and inconsistent with Hunt's possessory rights, title and interest. Coastal States responded, *inter alia*, with a counterclaim against Hunt for tortious interference with contractual and business relations.

It became apparent during pre-trial procedures that although the facts were essentially undisputed, there were a number of legal issues, including the applicability of the act of state doctrine, which required determination before the case was presented to a jury. Therefore, the parties consented to a pre-trial hearing to resolve such issues. The parties stipulated the facts upon which such hearing would be held and the issues that were to be determined at such hearing (Appendix E-1). Briefs were submitted on such issues, and, at the hearing, experts in international and foreign law gave their views regarding the application of international law and foreign law to the facts presented by this case. Myres S. McDougal, Sterling Professor of Law, Emeritus, of Yale Law School, and Hans W. Baade, Hugh Lamar Stone Professor of Law at the University of Texas Law School, opined in support of Hunt's position. Professor Hans Smit of Columbia University Law School and Mr. Abdul Magid M. Meyet, a Libyan lawyer, opined on behalf of Coastal States.

At the conclusion of the pre-trial hearing, the District Court, Judge Paul Pressler presiding, declared:

> I am impressed very much with the fact that Libya has done something that is very wrong, very wrong indeed.
>
> They have granted a right, and [have] arbitrarily without reason taken this right away from individuals who have invested a great deal of money in it.
>
> Now, this offends the sense of justice of this Court, and I think it has been adequately proven in this Court that this wrong was arbitrarily, capricious[ly] and maliciously committed.

Following the hearing, the parties submitted additional briefs and presented motions for summary judgment. The District Court, on October 24, 1977, rendered final judgment (1) granting Coastal States' motion for summary judgment that Hunt take nothing by reason of Hunt's claim, (2) denying Hunt's motion for summary judgment, or partial summary judgment on the issue of liability, on Hunt's claim, and (3) granting Hunt's motion for summary judgment that Coastal States take nothing by reason of Coastal States' counterclaim for tortious interference with contractual and business relations. Thus, the District Court denied Hunt and Coastal States any recovery on their respective claims. The Court based its decision upon certain conclusions of law recited in the judgment (Appendix D-1).

Both sides appealed from this judgment. Hunt questioned (1) the granting of summary judgment for Coastal States on Hunt's claim against Coastal States and (2) the denial of Hunt's motion for summary judgment, or partial summary judgment on the issue of liability, on his claim against Coastal States. Coastal States appealed from the portion of the judgment granting summary judgment for Hunt on its counterclaim.



On August 23, 1978, the Court of Civil Appeals for the Fourteenth Supreme Judicial District of Texas rendered its decision, affirming both the summary judgment against Hunt on his conversion claim and the summary judgment against Coastal States on its counterclaim. The Court of Civil Appeals held that the act of state doctrine barred judicial inquiry into the validity of Libya's expropriation of Hunt's property but that Hunt was legally justified in instituting litigation and informing others of his claim (Appendix C-13-14). Both sides filed Motions for Rehearing which were overruled (without opinion) on September 13, 1978.

Hunt and Coastal States subsequently filed Applications for Writ of Error to the Supreme Court of Texas. The Court granted both Applications on February 7, 1979, and oral argument was presented on March 7, 1979. The Court rendered judgment on June 13, 1979, affirming the summary judgments against Hunt and Coastal States. With regard to Hunt's claim, six members of the Court determined that the decision in *Hunt v. Mobil Oil Corp.*, 550 F.2d 68 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977), controlled Hunt's suit for conversion unless the Hickenlooper Amendment applied and that the Amendment did not apply because Hunt's concessionary rights were merely "contractual" in nature (Appendix A-6-8). Justice Steakley, joined by Chief Justice Greenhill and Justice Spears, dissented from this determination (Appendix B-1). With regard to Coastal States' counterclaim for tortious interference, the Court unanimously affirmed the summary judgment against Coastal States on the basis that Hunt was "fully justified in apprising the international community of his intent to file suit if they dealt with "oil" from the Sarir Field (Appendix A-8).

Both parties filed Motions for Rehearing which were overruled by the Court (without opinion) on July 18, 1979.

In response to a motion by Hunt, the Supreme Court stayed the issuance of its mandate pending final disposition of this Petition.

The Supreme Court of Texas, as noted above, relied upon the decision in *Hunt v. Mobil Oil Corp., supra* (Appendix M-1), to preclude consideration of several of Hunt's contentions. That case involved a suit by Hunt against several major oil companies, alleging breach of contract and violations of the antitrust laws of the United States. Coastal States was not a defendant in that suit since that claim involved an entirely different set of facts from those in the present action.

In 1971, a number of entities (including Hunt) which owned interests in Libyan concessions entered into an agreement regarding future negotiations with the Libyan Government. This agreement was entitled the "Libyan Producers' Agreement" of January 15, 1971. Several of the signatories, however, also owned interests in the Persian Gulf area which were more valuable than their Libyan holdings. It was Hunt's belief that these companies, by engaging in a series of activities over the years, sought to protect their Persian Gulf interests to the detriment of their less valuable Libyan properties and sought to eliminate competition from Libyan production.

On March 3, 1975, Hunt brought suit against the so-called "majors," alleging, in his third count, that they had induced him (by a series of misrepresentations) to take certain negotiating postures with the Libyan Government, and that, in reliance upon those misrepresentations and the Libyan Producers' Agreement, he had rejected certain demands of the Libyan Government. It was Hunt's contention that the defendants' manipulation of the course of negotiations with the Libyan Government and other conduct led to the Libyan



expropriation of Hunt's rights in Concession No. 65. Hunt also alleged that the majors had breached the Libyan Producers' Agreement. (Appendix M-7)

Hunt did not join Libya as a defendant since, in the context of that case, both Libya and Hunt were objects of the defendants' conspiracy to eliminate competition from the Libyan oil fields. The failure to join Libya as a party did not imply, however, that Libya was in any way controlled by the defendants or less than fully responsible for its actions. It simply indicated that Libya was not a co-conspirator with the defendants.

The defendants responded with a pre-trial motion to dismiss all of Hunt's claims. The District Court held that Hunt's third claim (summarized above) required "inquiry into acts and conduct of Libyan officials, Libyan affairs and Libyan policies with respect to plaintiff's as well as other oil producers' properties and the underlying reasons for the Libyan government's actions." *Hunt v. Mobil Oil Corp.*, 410 F.Supp. 10, 24 (S.D.N.Y. 1975) (Appendix L-23). The trial court concluded that it was precluded from making such inquiry by the act of state doctrine and dismissed that portion of Hunt's claim.

On appeal, the Court of Appeals affirmed on the basis that judicial inquiry was barred by the act of state doctrine. *Hunt v. Mobil Oil Corp.*, 550 F.2d 68 (2d Cir. 1977) (Appendix M-1). Hunt filed a petition for writ of certiorari from that decision. This Court, after requesting the Attorney General to submit an amicus curiae brief on the act of state doctrine, denied the petition. 434 U.S. 984 (three justices not participating).

The District Court subsequently considered the remainder of Hunt's claims and, following trial on the merits, rendered

its decision on October 12, 1978. *Hunt v. Mobil Oil Corp.*, 465 F.Supp. 195 (S.D.N.Y. 1978). That decision is presently on appeal to the United States Court of Appeals for the Second Circuit.

## REASONS FOR GRANTING THE WRIT

The courts below have decided a substantial federal question, *i.e.*, the application of the act of state doctrine, in a manner not in accordance with prior decisions of this Court. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), and *Alfred Dunhill of London, Inc. v. The Republic of Cuba*, 425 U.S. 682 (1976). The lower courts also considered the applicability of the Hickenlooper Amendment, a federal question of substance which has not previously been determined by this Court. *See Banco Nacional de Cuba v. Farr*, 383 F.2d 166 (2d Cir. 1967), *cert. denied*, 390 U.S. 956 (1968), and *Alfred Dunhill of London, Inc. v. The Republic of Cuba*, *supra*, at 689, n. 4. This case, therefore, involves important questions of law and policy which should be addressed by this Court.

The uncontroverted facts demonstrate, as a matter of law, that the Libyan expropriation of Hunt's rights in Concession No. 65 was in violation of international law and that Coastal States exercised dominion and control over Sarir Field crude oil (and its products and proceeds) in contravention of Hunt's rights in and to such oil. Hunt is, therefore, entitled to recover against Coastal States for conversion unless the act of state doctrine bars judicial recognition of Hunt's claim. The courts below have erred in determining that the act of state doctrine applies in this case.

The act of state doctrine does not bar judicial recognition of Hunt's rights because:



(1) there was an "unambiguous agreement regarding controlling legal principles" between Hunt and Libya which permits judicial review;

(2) Libya engaged in a "commercial" activity and its repudiation of its commercial obligations could not constitute an "act of state";

(3) the Hickenlooper Amendment applies, as a matter of law, in this case; and

(4) the Bernstein exception to the act of state doctrine applies and permits judicial inquiry in this matter.

Consideration of these issues (contrary to the holding of the Texas Supreme Court) is not precluded by the Second Circuit's decision in *Hunt v. Mobil Oil Corp.*, *supra*. The lower courts also erred in holding that Libyan law alone is determinative of the nature of Hunt's rights in Concession No. 65 and erred in characterizing Hunt's rights as merely being "contractual" in nature.

Furthermore, if the lower courts have correctly interpreted and applied the act of state doctrine in this case, this Court should reexamine such doctrine and should either rescind or revise its prior statements in light of changing world conditions.

### 1. There was an "unambiguous agreement regarding controlling legal principles."

The act of state doctrine does not apply *by its very terms* in this case. In 1964, this Court examined, in depth, the act of state doctrine in *Banco Nacional de Cuba v. Sabbatino*, *supra*. Following an examination of the history and foundation of the doctrine, the Court concluded:

> If the act of state doctrine is a principle of decision binding on federal and state courts alike but compelled by neither international law nor the Constitution, its

continuing vitality depends on its capacity to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs. *It should be apparent that the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice.* It is also evident that some aspects of international law touch much more sharply on national nerves than do others; the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches. . . . Therefore, rather than laying down or reaffirming an inflexible and all-encompassing rule in this case, we decide only that the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, *in the absence of a treaty or other unambiguous agreement regarding controlling legal principles*, even if the complaint alleges that the taking violates customary international law.[5]

376 U.S. at 428.

Judicial concern for the necessity of accepted legal standards is apparent in the quoted passage. Where there are no standards, the possibility for embarrassment in the conduct of our foreign relations increases. When a foreign government has agreed to be bound by certain extraterritorial legal principles, however, no embarrassment can result from the application of such principles to determine the validity of an expropriative act.

[5] Unless otherwise noted, all italics or other emphasis are supplied by the writers of this Petition.



This limitation on the scope of the act of state doctrine is well founded in early decisions involving the doctrine. *Blad v. Bamfield*, 3 Swans. 604, 36 Eng.Rep. 992 (1674); *Duke of Brunswick v. King of Hanover*, [1848-50] 2 H.L.C. 1; *Banco de Espana v. Federal Reserve Bank of New York*, 114 F.2d 438, 443-444 (2d Cir. 1940). In those cases, the courts were expressly concerned with the possibility of embarrassment in foreign relations which might result from a judicial determination that a foreign government's acts were inconsistent with its own internal laws. As originally conceived, the act of state doctrine only precluded consideration of foreign internal laws which had only internal application. The courts were not concerned about embarrassment when there were applicable extraterritorial legal principles.

Indeed, the territorial limitation of the act of state doctrine is a reflection of this concept. *Republic of Iraq v. First National City Bank*, 353 F.2d 47 (2d Cir. 1965), *cert. denied*, 382 U.S. 1027 (1966); *United Bank Limited v. Cosmic International, Inc.*, 542 F.2d 868 (2d Cir. 1976). *See New York Times Co. v. City of New York Commission on Human Rights*, 41 N.Y.2d 345, 361 N.E.2d 963, 972-973 (Ct.App. 1977), where the dissenting opinion noted:

> The essence of the Act of State Doctrine is that the proper conduct of foreign relations of any Nation requires respect for the act of any other sovereign state committed "within its own territory" (see *David v. Veitscher Magnesitwerke Actien Gesellschaft*, 348 Pa. 335, 345-346, 35 A.2d 346). The significant phrase "within its own territory" precludes inquiry by a court in the United States as to the validity of acts of foreign states affecting property located within, or contracts governed by the laws of such states; it does not bar inquiry affecting or purporting to affect property not located within, or contracts not governed by, the acting state. . . .

Thus, where a foreign government has entered into an "unambiguous agreement regarding controlling legal principles," it is bound by such principles, and the act of state doctrine does not operate as a bar in such cases.

There was such an agreement between Hunt and Libya. Clause 28/7 of the concession agreement (as amended) provided:

> This Concession shall be governed by and interpreted in accordance with the principles of law of Libya common to the principles of international law and in the absence of such common principles then by and in accordance with the general principles of law, including such of those principles as may have been applied by international tribunals.

(Appendix F-26)

This choice-of-law provision was prescribed by and incorporated as a part of the Libyan Petroleum Law No. 25 of 1955. It is a perfect example of a foreign government unambiguously agreeing to be bound by certain legal principles.

With regard to this contention by Hunt, the Texas Court of Civil Appeals declared:

> We have examined subsequent cases which cite the aforementioned language and conclude it is unclear what type of "unambiguous agreement" the [*Sabbatino*] opinion refers to.

(Appendix C-13) The Court of Civil Appeals then determined, contrary to the stipulated evidence, that:

> However, we conclude that this language is inapplicable to this case since, as we have held, Libya did not expropriate property (the oil) from Hunt.

(Appendix C-13)

The Supreme Court of Texas did not consider the legal effect of Clause 28/7. Rather, the Court held that the decision in *Hunt v. Mobil Oil Corp., supra*, collaterally estopped consideration of that issue. This holding is erroneous because the effect of Clause 28/7 was never an issue in that case. Indeed, it could not have been an issue because Hunt was not asserting any rights pursuant to the concession agreement in his antitrust claim against third parties which never purchased Sarir Field crude oil from Libya.



Nor is such issue precluded by the Second Circuit's determination that there was an act of state by the Libyan Government. This Court, in *Sabbatino*, determined that *even if* there were an act of state by a foreign government, the validity of its actions can be examined if there was an "unambiguous agreement regarding controlling legal principles" to which the foreign government consented to be bound.

It should be noted that the Libyan expropriation differs in one respect from the Cuban expropriation involved in *Sabbatino*. Although both expropriations violated principles of international law, the Libyan Government also breached its contract with Hunt. There was no such contract in *Sabbatino*. Thus, this Court did not have before it an "unambiguous agreement" between the government and the victim of the expropriation which it has in this case. The Court, however, foresaw this situation in *Sabbatino*.

Indeed, it is difficult to imagine a more perfect example of an "unambiguous agreement regarding controlling legal principles." The lower courts have failed to follow this Court's pronouncement in *Sabbatino* regarding such an agreement. If the decisions of the lower courts are allowed to stand, a number of questions will be raised concerning this Court's holding in *Sabbatino*. This Court should grant this Petition and resolve such questions.

**2. Libya engaged in a "commercial" activity and the repudiation of its commercial obligations is not within the act of state doctrine.**

The courts below also failed to follow the limitation on the act of state doctrine noted by four members of this Court regarding the commercial obligations of a foreign government. In *Alfred Dunhill of London, Inc. v. The Republic of Cuba, supra*, Justice White, joined by Chief Justice Burger, Justice Powell, and Justice Rehnquist, declared:

> If we assume with the Court of Appeals that the Cuban Government itself had purported to exercise sovereign power . . . we are nevertheless persuaded by the arguments of petitioner and by those of the United States that the concept of an act of state should not be extended to include the repudiation of a purely commercial obligation owed by a foreign sovereign or by one of its commercial instrumentalities. Our cases have not yet gone so far, and we decline to expand their reach. . . .

425 U.S. at 695.

The members of the Court noted that this was "not a novel approach," relying upon Chief Justice Marshall's pronouncement in *Bank of United States v. Planters' Bank of Georgia*, 9 Wheat. 904, 907 (1824):

> It is, we think, a sound principle, that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted.

This approach is entirely proper in the present case. The concession agreement between Hunt and Libya was undoubt-



edly "commercial" in character. The activities conducted by Hunt and BP, *i.e.*, exploring, drilling, developing, and selling oil from the Sarir Field, were commercial in character. Both Hunt and BP paid taxes and royalties on Sarir Field production to Libya, and, following BP's expropriation, Libya became Hunt's "trading partner" in such oil. Following Hunt's expropriation, Libya continued this commercial enterprise by selling the Sarir Field oil to third parties such as Coastal States.[6]

The Texas Court of Civil Appeals held that the "commercial" activity exception to the act of state doctrine enunciated in *Dunhill, supra*, did not apply in this case on the basis that "when a foreign state has exercised a sovereign power, as Libya did here, it is a governmental, and not a commercial, act." (Appendix C-8) That ruling entirely misconceives the true issue. The question is not the nature of the repudiation, the issue is the nature of the underlying obligation or activity. It is immaterial whether the repudiation is by "statute, decree, order, or resolution," *Dunhill*,

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[6] The commercial nature of Libya's obligation is supported by the legislative history of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1602, *et seq.* As noted in House Report No. 94-1487, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 6604, 6614-6615:

> (d) *Commercial activity.* — Paragraph (c) of section 1603 defines the term "commercial activity" as including a broad spectrum of endeavor, from an individual commercial transaction or act to a regular course of commercial conduct. A "regular course of commercial conduct" includes the carrying on of a *commercial enterprise such as a mineral extraction company*, an airline or a state trading corporation. Certainly, if an activity is customarily carried on for profit, its commercial nature could readily be assumed. . . .

Furthermore, it is well recognized that a foreign government may act in different capacities at different times. *Yessenin-Volpin v. Novosti Press Agency*, 443 F.Supp. 849, 855 (S.D.N.Y. 1978). A foreign government does not always act in a sovereign capacity.

*supra*, at 695; once sovereignty has been forfeited, it is not regained by any particular method of repudiation. Indeed, under the Court of Civil Appeals' reasoning, the express repudiation of a commercial obligation by a foreign government would always be a sovereign act.

The Supreme Court of Texas erroneously concluded that consideration of this issue was also precluded by the decision in *Hunt v. Mobil Oil Corp., supra.* It is unclear whether the applicability of the commercial activity exception was ever reached in that appeal, however. The *Dunhill* decision was rendered in the interval between the decision of the District Court and oral argument in the Court of Appeals; *Dunhill* was neither addressed by the trial court nor in the appellate briefs. Furthermore, the bulk of the Court of Appeals' discussion of the commercial activity exception followed its statement that:

> Appellants [Hunt] conceded on oral argument of this appeal that the nationalization of Hunt's properties was not a purely commercial act within the *Dunhill* exception.

(Appendix M-9)

That statement cannot be substantiated in the record of that case, and the supposed oral declaration by other counsel should not bar consideration of that issue in this case. There either was or was not a repudiation of a commercial obligation by Libya, and the oral declaration of counsel cannot change that legal conclusion.

It should be noted that Libya's actions in expropriating Hunt's rights in Concession No. 65 were not part of a larger nationalization of the oil industry. The actions of the Libyan Government were directed solely at Hunt as an American citizen (Appendix H-7-8). The taking of Hunt's property was not, therefore, a "legislative act" or a *jure imperii. Cf. Victory Transport, Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354, 360 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965). Rather, the actions of the Libyan Government constituted a breach of its commercial obligations to Hunt. As a private, commercial act, it was a *jure gestionis.*



Both the Executive Branch and Congress have declared that it is in America's interest to have commercial transactions of foreign governments subject to the rule of law. Brief of the United States as Amicus Curiae in *Dunhill, supra*, and House Report No. 94-1487, *supra.* The increased volume of international trade and the increased involvement of foreign governments (and their instrumentalities) in such trade emphasize the need for stability. International Economic Report of the President 56 (1975); *Outboard Marine Corp. v. Pezetel*, 461 F.Supp. 384 (D. Del. 1978); *Pan American Tankers Corp. v. Republic of Vietnam*, 296 F.Supp. 361 (S.D.N.Y. 1969). Expropriative acts cause disruption of commercial relations, and the effect of the American act of state doctrine (in the absence of a commercial exception) is to recognize the validity of such acts. Courts in this country should not, therefore, apply an outdated doctrine of abstention in cases (such as this) which involve the conduct of a commercial enterprise by a foreign government.

### 3. The Hickenlooper Amendment applies in this case and requires judicial recognition of Hunt's rights.

The Hickenlooper Amendment to the Foreign Assistance Act of 1964, 22 U.S.C. § 2370(e)(2), is a legislative exception to the judicially-created act of state doctrine. It was intended to reverse in part the decision in *Sabbatino, supra.* S. Rep. No. 1188, Part I, 88th Cong., 2d Sess. 24, *reprinted in* [1964] U.S. CODE CONG. & AD. NEWS 3852.

As amended, the Hickenlooper Amendment provides (in pertinent part):

> [N]o court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which *a claim of title or other right to property* is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation . . . by an act of that state in violation of the principles of international law. . . .

The courts below held that Hunt's claim to the oil produced from the concession area following the Libyan expropriation of Hunt's property in May of 1973 does not come within this statutory language.[7] The courts based this conclusion on the theory that Hunt did not own "title" to oil in place under Libyan law, and, therefore, he had only a "contractual" right which was not covered by the statute.[8] By this holding, the Texas courts determined, for the first time in American jurisprudence, that a "contractual" right to specific property is not a "right to property" under the Hickenlooper Amendment. This determination is erroneous for several reasons.

First, the courts erroneously focused solely upon Hunt's rights. There is no statutory requirement that Hunt be the

[7] It should be noted that the Texas Supreme Court did not hold that consideration of this issue was barred by the decision in *Hunt v. Mobil Oil Corp., supra* (Appendix A-5).

[8] The majority opinion in the Texas Supreme Court did not address the statutory requirements that the expropriation be in violation of principles of international law and that the President fails to file a suggestion with the court that the country's foreign policy interests require the application of the act of state doctrine. As discussed in the dissenting opinion, however, the record clearly shows that such requirements have been met in this case (Appendix B-18-26).



party asserting the claim to property; Coastal States' claim is sufficient to activate the statute. The Amendment applies "in a case in which a claim of title or other right to property is asserted *by any party including a foreign state (or a party claiming through such state)* based upon (or traced through) a confiscation. . . ." Coastal States is claiming oil (or the proceeds from such oil) based upon (or traced through) the Libyan expropriation of Hunt's interest in Concession No. 65, and the statute applies in such circumstances.[9]

Second, Hunt's claim comes within the express wording of the statute *whether or not* he owned title to oil in place. Although Hunt contends that he did own title to oil in place under the applicable principles of law, such title is not required by the Amendment. The only requirement is that there be a right to specific property. *Banco Nacional de Cuba v. First National City Bank*, 431 F.2d 394 (2d Cir. 1970), *vacated and remanded on other grounds*, 400 U.S. 1019 (1971). It is undisputed that Concession No. 65 granted Hunt the exclusive right to all the oil produced from the concession area for a period of fifty years (Appendix F-3). Nor is there any dispute that Hunt is asserting this right with regard to specific oil (and the proceeds therefrom) which was produced from the concession area following Hunt's ouster (Appendix E-8). The statute is activated in such circumstances.

Third, the legislative history of the Hickenlooper Amendment supports its application in this case. Indeed, Justice

[9] In fact, the plaintiff in *Sabbatino* was a Cuban entity which (like Coastal States) was claiming the proceeds from certain property by reason of an expropriation. Since the Hickenlooper Amendment was passed in response to *Sabbatino*, Congress must have intended the statute to apply to claims such as Coastal States'.

Steakley in his dissenting opinion in the Texas Supreme Court concludes:

> The legislative history indicates that the case at bar presents precisely the type of claim that was contemplated by Congress in the passage of the Hickenlooper Amendment.

(Appendix B-12)

The Second Circuit in *Banco Nacional de Cuba v. First National City Bank*, *supra*, traced the legislative history of the statute and declared, at 400:

> It is evident from the proceedings in Congress relating to the Hickenlooper Amendment that Congressmen and others were quite concerned about the problem peculiarily related to the facts of the *Sabbatino* case. At the time of the Congressional debates during 1964 and 1965, virtually all American-owned property in Cuba had been nationalized. Much of this property consisted of *productive installations such as sugar plantations, fertilizer plants, mines, and oil production facilities.* In light of this, when the Supreme Court in *Sabbatino* issued a ruling which would apparently permit Banco Nacional to prevail over an American-owned firm in securing the proceeds of the sale of a shipment of expropriated sugar to an American commodity broker, the phrase "thieves' market for expropriated property" came into vogue. In explaining this proposal in an August, 1964, letter to the Washington Post, Senator Hickenlooper used the term "thieves' market," and explained further that the Amendment's purpose was to require American courts to apply international law "whenever expropriated property comes within the territorial jurisdiction of the United States." 110 Cong. Rec. 19548.

Further examination of the legislative history confirms the conclusion that it was intended to apply in cases such



as this. Senator Hickenlooper, co-sponsor of the Amendment, stated:

> Basically, the amendment is designed to assure that the private litigant is granted his day in court.
>
> • • •
>
> This amendment is an exercise of our broad powers with respect to foreign commerce and investment and will restore the rule in our courts that acts of a foreign state are subject to international law. This supplement to section 620(e) of the Aid Act will discourage foreign expropriation by making sure that the United States cannot become a "thieves market" for the *product* of foreign expropriations.
>
> • • •
>
> One of the principal reasons for the proposed amendment is that it will serve notice that foreign states taking action against U.S. investment in violation of international law cannot market the *product* of their expropriation in the United States free from the risk of litigation. Thus, the amendment itself will do much to deter illegal takings and thereby exert a positive influence to avoid the embarassment to U.S. foreign policy interests caused by such takings.

110 Cong. Rec. 18936, 19555, 19559 (1964).

Thus, the Texas courts' interpretation of the statute is contrary to the express wording and essential purpose of the statute. The basis for such holding is an (erroneous) interpretation of Libyan property law. However, neither the Hickenlooper Amendment nor international law is concerned with technicalities of Libyan law. The statutory language "title or other right to property" is broad. Obviously, Congress was not concerned with the exact legal nature of the right being asserted. The only statutory criteria is that there be a right to specify property. In addition, international law is not concerned with technicalities of prop-

erty law (which change from country to country). Mann, *The Consequences of an International Wrong in International and National Law*, 1975-1976 British Yearbook of International Law 1, 55-56 (1977).

> International law, when it assesses the consequences of an international delinquency, does not take account of legal technicalities or refinements, nor can the wrongdoing State expect it to do so. Any different view would impose upon the plaintiff a burden of proof which as a rule he cannot discharge and which in any event would be so elusive as to render the plaintiff's rights illusory or, to look at the other side of the coin, to allow the wrongdoing State to enjoy the benefit of its tortious act. This the law ought not to allow.

*Id.*

The Supreme Court of Texas cited four decisions as the basis for its holding that Hunt's "contractual" rights do not come within the statute (Appendix A-7-8). They are: (1) *Present v. U.S. Life Ins. Co.*, 96 N.J.Super. 285, 232 A.2d 863 (1967), *aff'd per curiam*, 51 N.J. 407, 241 A.2d 237 (1968); (2) *French v. Banco Nacional de Cuba*, 23 N.Y.2d 46, 242 N.E.2d 704, 296 N.Y.S.2d 433 (1968); (3) *Menendez v. Saks & Company*, 485 F.2d 1355 (2d Cir. 1973), *rev'd sub nom., Alfred Dunhill of London, Inc. v. The Republic of Cuba, supra;* and (4) *Occidental of Umm al Qaywayn, Inc. v. Cities Service Oil Co.*, 396 F.Supp. 461 (W.D.La. 1975), *dism'd in part and rev'd in part sub nom., Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo, etc.*, 577 F.2d 1196 (5th Cir. 1978), *cert. denied*, 99 S.Ct. 2857 (1979).

None of these decisions is directly on point, however, and none of them precludes recovery by Hunt on the theory that he only owned "contractual" rights to the oil. As pointed out by Justice Steakley in his dissenting opinion,



both *Present* and *French* are distinguishable from the present case in a number of ways (Appendix B-14-16).

Neither the majority opinion nor the dissenting opinion noted that this Court granted a writ of certiorari in *Menendez*. Both opinions erroneously reflected a "cert. denied" writ history. After granting one of three petitions, this Court reversed the lower court's decision regarding the applicability of the act of state doctrine. *Dunhill, supra.* The Court expressed no opinion, however, with respect to the correctness of the Second Circuit's holding regarding the Hickenlooper Amendment. 425 U.S. at 689, n. 4. Furthermore, the claim asserted by the plaintiff-importers in that case, *i.e.*, the right to reimbursement for mispaid monies, is pragmatically different from Hunt's claim to Sarir Field oil (and the proceeds therefrom). This distinction was recognized by the Second Circuit in *Menendez* when the Court stated:

> For instance, the [Hickenlooper] amendment might be invoked by an American firm if an effort should be made to market the product of such an expropriation in the United States.

486 F.2d at 1372.

As the dissenting opinion correctly notes (Appendix B-16-18), *Occidental* was the only case that involved property allegedly confiscated and later brought into the United States. Unlike the present case, however, that case involved both an international boundary dispute and oil produced pursuant to a concession issued by a different sovereign to a different party. It did not involve the expropriation of a fully developed concession; indeed, the concession under which the plaintiff company was claiming title had been forfeited due to nonpayment of monies. 396 F.Supp. at 465. The District Court refused to hold the Hickenlooper Amendment applicable in such circumstances. The Court indicated, however,

that its decision would have been different if a concession fully developed by the plaintiff (as in this case) had been expropriated. 396 F.Supp. at 472.

On appeal, the Fifth Circuit dismissed Occidental's claims. The Court of Appeals did not address the trial court's determination regarding the Hickenlooper Amendment. Rather, it held that judicial inquiry into the merits was barred by the political question doctrine since Occidental's claim required the resolution of an international boundary dispute which American courts were powerless to decide. 577 F.2d at 1203.

In summary, the courts below have held, for the first time in American jurisprudence, that the Hickenlooper Amendment does not apply where a party is asserting a right to specific property expropriated in violation of international law and later brought into the United States. Such a result is neither in accord with the express wording of the statute nor its legislative history. The decisions relied upon for this result are not in point and do not support the holding of the lower courts.

**4. The Bernstein exception applies and allows judicial inquiry in this case.**

The Bernstein exception was formulated by the Court of Appeals for the Second Circuit in *Bernstein v. Nederlandsche —Amerikaansche Stoomvaart-Maatschappij*, 173 F.2d 71 (2d Cir. 1949), *modified*, 210 F.2d 375 (2d Cir. 1954). This judicially-created exception to the act of state doctrine was founded upon the theory that the underlying reason for the doctrine is the potential for frustration in the conduct of foreign relations by the political branches of government. When the Executive Branch determined that application of the act of state doctrine in a particular case would not advance the interests of American foreign policy, the doctrine



would not be applied by the courts. Or, "[t]he reason for the law ceasing, the law itself also ceases." *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 767 (1972) (herein "*Citibank*").

The *Bernstein* case has never been overruled, and the present case clearly falls within the parameters of the Bernstein exception (Appendix J-3). Of course, the validity of the Bernstein exception is in doubt following this Court's decision in *Citibank*. In that case, only three Justices expressly approved the Bernstein exception; two Justices expressed reservations about the exception but joined in the result for their own reasons; and, four Justices expressly disapproved of the exception.

The grounds for judicial objection to the Bernstein exception are not present in this case, however. In *Citibank*, at 783-785, Justice Brennan (in dissent) stated that the issuance of a Bernstein-type letter in a particular case would not remove the possibility of interference with the Executive Branch in the conduct of foreign relations, but he noted:

> This reasoning may not apply where the Executive expressly stipulates that domestic foreign policy interests will not be impaired however the court decides the validity of the foreign expropriation. But by definition those cases can only arise where the political branch is indifferent to the result reached, and that surely is not the case before us.

406 U.S. at 783.

The position of the Executive Branch has changed in the intervening years since the decision in *Citibank*. The State Department no longer believes that the act of state doctrine promotes American interests abroad in any situation. In a

letter from the Department of State to the Solicitor General of the United States, the Department's Legal Advisor stated:

> In general this Department's experience provides little support for a presumption that adjudication of acts of foreign states in accordance with relevant principles of international law would embarrass the conduct of foreign policy. Thus, it is our view that if the Court should decide to overrule the holding in Sabbatino so that acts of state would thereafter be subject to adjudication in American courts under international law, we would not anticipate embarrassment to the conduct of the foreign policy of the United States.

Appendix 1 to Opinion of the Court, *Dunhill, supra*, at 710-711.

Thus, the Executive Branch has now declared that application of the act of state doctrine would not advance American interests abroad. A case-by-case determination of the Executive is no longer required, and the potential for conflict between the disparate branches of government is diminished.

Furthermore, other grounds for not recognizing the Bernstein exception are absent in this case. Justice Brennan, in *Citibank, supra*, at 788, noted that factors to be considered in determining whether a "political question" is involved are: (1) the absence of standards of conduct in international law or by reason of a treaty or other agreement, (2) the existence and recognition of the foreign government, (3) the sensitivity of the issues to national concerns, and (4) the power of the Executive alone to effect a remedy for all the American citizens who have been harmed.

First, there are applicable standards of conduct that Libya agreed to by virtue of Clause 28/7 of the Concession. Second, the state of diplomatic relations between Libya and the United States does not pose any obstacle to judicial consideration of Hunt's claim. In the Statement by the Department of State on Policy on "Hot" Libyan Oil, the Executive declared:



> In these circumstances, and having regard to the foreign policies pursued by the Libyan Government and the state of relations between the Libyan and United States Governments, it was and remains highly unlikely that the Executive Branch would find it appropriate to request courts in the United States to refrain from passing upon acts of the Libyan Government on grounds of "act of State". . . .

(Appendix K-20)

Third, judicial recognition of Hunt's rights will not irritate sensitive national concerns. This case does not involve the power of a foreign government to control its own natural resources since it does not involve a nationalization of all petroleum concessions by Libya. Nor does it involve the imposition of certain standards of international law on Libya; Libya expressly agreed to be bound by such standards. *Sabbatino, supra*, at 429-430.

Furthermore, any offense to the Government of Libya is purely hypothetical in this private action between Hunt and Coastal States. *Maltina Corp. v. Cawy Bottling Co.*, 462 F.2d 1021, 1029-1030 (5th Cir. 1972). Neither Libya nor AGECO is a party to this suit, and neither has expressed any interest in the outcome of this litigation.

Indeed, any sensitivity of the issues involved would only arise by this Court's refusal to grant this Petition. Both the Executive Branch and Congress have declared that this type of case should be subject to review in our courts; they have declared that such expropriative acts should be subject to the rule of law when they have an impact in this country. Politically sensitive issues will only arise by disregarding such expressions and refusing to grant this Petiton.

Fourth, the "power of the Executive alone to effect a fair remedy" for all American citizens who were injured was disclaimed by the Executive in the Statement of the Department of State on Policy on "Hot" Libyan Oil. It stated:

> The leverage that Hunt, and the U.S. Government, could bring to bear on Libya was limited; an important element of it was legal action in pursuit of "hot" oil.

(Appendix K-10); *See also*, Leigh, *Expropriation of Foreign-Owned Investment*, in Symposium: Private Investors Abroad 197, 245 (V. Cameron ed. 1972).

The only American citizen injured by the Libyan expropriation was Hunt, and the Executive Branch had only limited power to effect a fair remedy for him. This Court, by recognizing his claim against Coastal States, has the power to partially recompense Hunt for his loss.

Thus, the reasons for not applying the Bernstein exception are absent in this case. This Court should recognize its applicability in this case and grant this Petition.

**5. The lower courts erred in holding that Libyan law alone is determinative of Hunt's rights.**

The courts below concluded that Libyan law alone is determinative of the nature of Hunt's rights in Concession No. 65. Such ruling is erroneous because international law applies by its own force to determine the validity and effect of the Libyan expropriation and because Clause 28/7 mandates the application of principles of international law or general principles of law rather than Libyan law.

International law is a part of American jurisprudence. *Hilton v. Guyot*, 159 U.S. 113, 163 (1894); *The Paquete Habana*, 175 U.S. 677, 700 (1900); *State of Kansas v. State of Colorado*, 206 U.S. 46, 97 (1907). Perhaps the most elementary and well recognized principle of international law is the validity and binding effect of contracts or "pacta sunt servanda." *Sapphire International Petroleum, Ltd. v. The National Iranian Oil Co.*, [1963] 35 Int'l L.Rep. 137; *Saudia Arabia v. The Arabian American Oil Company*, [1958] 27 Int'l L.Rep. 117; Wehberg, "Pacta Sunt Servanda," 53 Am.J.Int'l 4 (Oct. 1959).



Libya, by expropriating Hunt's rights in Concession No. 65, breached its agreement with Hunt. However, this case involves far more than a mere breach of contract. It also involves the arbitrary assertion of power by one state against the citizen of another state. In such actions, there must be compliance with the standards of international law.

> Whatever the position under municipal law, it is to the standards of international law which States in their treatment of alien property interests, must adhere.

Toriguian, *Legal Aspects of Oil Concessions in the Middle East*, 209 (Hamaskaine Press, Beirut, 1972).

International law, therefore, applies by its own force to agreements such as Concession No. 65. The Libyan expropriation clearly violated the standards of international law. *Banco Nacional de Cuba v. Farr, supra; Republic of Iraq v. First National City Bank, supra.* American courts are charged with the responsibility of enforcing these principles. Jenks, *The Prospects of International Adjudication*, 712 (1963); Morganstern, "Recognition and Enforcement of Foreign Legislative, Administrative, and Judicial Acts Which are Contrary to International Law," 4 Int.L.Quar. 326, 340 (1951). Thus, it is entirely proper under international law for Hunt to bring this action for recovery of the oil produced from Concession No. 65.

Indeed, Professor Myres McDougal of Yale, who opined on behalf of Hunt in the District Court, noted that the Responsibility of State Doctrine (a part of international law) allows Hunt to bring a conversion action against Coastal States even if Libyan law were to the contrary.

Second, the courts below erred in declaring that Libyan substantive law governs the interpretation and construction of the rights conferred on Hunt by the Concession because Clause 28/7 rules out Libyan law as the governing law of the agreement. *International Arbitral Tribunal's Award on the Merits between the Government of the Libyan Arab Republic and California Asiatic Oil Company and Texaco Overseas Petroleum Company* (the "Texaco Award").[10]

The specification by Hunt and Libya of legal principles other than Libyan law is completely understandable in the context of an international oil concession. Such clauses are intended to "stabilize" the rights granted by such concessions by removing them from the sphere of the municipal laws of either party. Kissam and Leach, *Sovereign Expropriation of Property and Abrogation of Concession Contracts*, 28 FORDHAM L.REV. 177 (1959). Indeed, the concept that a foreign government and an alien can agree that their rights are to be governed by a body of transnational law has been recognized by the Department of State. Brief for the United States as Amicus Curiae in *Alfred Dunhill of London, Inc. v. The Republic of Cuba*, *supra*, at 37-38, n. 16; *see also* ALI RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES § 193(1) (1965).

[10] This arbitral award is unpublished but was presented to the District Court and is included in the official record of this cause.



Furthermore, even if Libyan substantive law were determinative of Hunt's rights, Clause 28/7 *is* the Libyan law regarding rights granted a concessionaire. The Libyan Petroleum Law No. 25 of 1955 prescribed a form for all concessions, and this form included Clause 28/7. Thus, principles of international law and general principles of law were clearly agreed to by Libya and should be examined in determining the nature of Hunt's rights.

The lower courts also erroneously concluded that, under Libyan law, Hunt did not own title or some lesser *in rem* right to oil in the ground. Upon the granting of this Petition, Hunt will demonstrate that, as a matter of law, the Concession granted him title to oil in place or some lesser right sufficient to support a continuing post-confiscation claim to Sarir Field oil under Libyan law, international law, and general principles of law.

### 6. The act of state doctrine should be reassessed or refined.

The theoretical underpinnings of the act of state doctrine have been the subject of extensive academic and judicial debate. Leigh and Sandler, *Dunhill: Toward a Reconsideration of Sabbatino*, 16 VA. J. INT'L L. 685, 685-687 (1976); Note, *Sherman Act Jurisdiction and the Acts of Foreign Sovereigns*, 77 COLUM.L.REV. 1247, 1255 (1977); *Citibank, supra; Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo, etc., supra*, at 1200-1201, n.4; *Industrial Investment Development Corp. v. Mitsui & Co., Ltd.*, 594 F.2d 48, 51, n.8 (5th Cir. 1979); *D'Angelo v. Petroleos Mexicanos*, 331 A.2d 388 (Del. 1974); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1292-1293 (3d Cir. 1979).

One thing is clear, however. The doctrine is not required by the Constitution or international law. *Sabbatino*, *supra*,

at 421-423. The American act of state doctrine is, principally, the creation of this Court. *Underhill v. Hernandez*, 168 U.S. 250 (1897); *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918); *Ricaud v. American Metal Co.*, 246 U.S. 304 (1918); *Sabbatino, supra.* This Court may, therefore, reassess, redefine, or refine the doctrine if it so chooses.

This is the perfect case in which to do so. The property of an American citizen (Hunt) was wrongfully taken from him by a foreign government (Libya) with which he had contracted. The taking was arbitrary, discriminatory, and politically motivated; furthermore, the Libyan Government did not pay prompt, adequate, and effective compensation to Hunt. Libya then enlisted the aid of Coastal States, an American entity, to market the stolen property. Part of the products and all of the proceeds from Coastal States' participation in these wrongs have flowed into the United States. Such profiteering violates the public policy of this country as declared by Congress and the Executive Branch.

Even though all the parties to this suit are United States citizens, and even though the Executive Branch has condemned Libya's actions and has supported the assertion of Hunt's rights, the courts of this country have rendered themselves powerless to adjudicate Hunt's rights. Libya and Coastal States are thereby given carte blanche to violate United States policy and law within our borders. Surely, such a result was never intended by the framers of the act of state doctrine.

If (contrary to Hunt's contentions) the doctrine has been properly construed and applied by the courts below, then the doctrine should be abandoned. It no longer serves the interests of our nation. Appendix 1 to Opinion of Court, *Dunhill, supra.* Indeed, it subverts the express policies of



our country and subserves foreign interests by recognizing the effectiveness of their illegal acts in this country.

Rather than contributing to the rule of law, the American judiciary has been eliminated from the process of formulating standards of international law.[11]

> [F]or a period of more than a dozen years, now perhaps approaching its end, one of the most authoritative and enlightened tribunals in the world, the Supreme Court of the United States, had caused that high-mindedness and idealism which is necessary for the implementation of public international law by municipal courts to be paralysed and undermined.

Mann, *The Consequences of an International Wrong in International and National Law, supra*, at 15.

Alternatively, refinements in the doctrine may be necessary in order to prevent injustices such as are evident in this case and, at the same time, preserve any salutary policy considerations which the doctrine protects. The act of state doctrine, as presently applied by American courts, is a rigid and mechanical rule. This is contrary to this Court's statement in *Sabbatino* that:

> Therefore, rather than laying down or reaffirming an inflexible and all-encompassing rule in this case, we decide only . . . .

376 U.S. at 428.

A discretionary rule could be dependent upon a number of factors such as: (1) the citizenship of the parties; (2)

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[11] The pronouncements of municipal courts have always been among the sources of international law. *See* Article 28.1 of the Statute of the International Court of Justice (1945), and *Hilton v. Guyot, supra.* In the critical areas of protection of foreign investment abroad, standards for expropriation, and marketing of expropriated property, American courts will not (if the decisions below stand) be heard.

the power of the court to grant full relief on the cause of action asserted; (3) the potential for embarassment to the Executive Branch; and (4) the impact of recognition on the public policies of the United States. The act of state doctrine (if it survives at all) should not be an "inflexible and all-encompassing rule." Rather, it should be a rational doctrine which will empower American courts to weigh competing interests and policy considerations on a case-by-case basis.

## CONCLUSION

The act of state doctrine should not bar judicial recognition of Hunt's rights for a number of reasons. The courts below have ignored this Court's statements in *Sabbatino* and *Dunhill*. They have construed the Hickenlooper Amendment in a manner inconsistent with its express wording and its basic purpose. Indeed, if the lower courts' interpretation of the statute is allowed to stand, it will render the statute meaningless in the vast majority of cases.

As a matter of public policy, Coastal States should not be allowed to escape unscathed. The decision of the courts below will allow the United States to become a "thieves' market" where renegade governments and their cohorts can sell expropriated property without fear. Congress has declared, by means of the Hickenlooper Amendment, that this should not be the policy of our nation.

Furthermore, there is no reason to apply the act of state doctrine in this case because the Bernstein exception applies. There have been many changes since this Court considered *First National City Bank v. Banco Nacional de Cuba, supra*, and the factors noted in that case should not hinder judicial recognition of Hunt's rights in this case.



Lastly, if (contrary to Hunt's contentions) the act of state doctrine bars Hunt's claim against Coastal States, then this Court should reassess and redefine that doctrine.

This Petition for Writ of Certiorari should be granted in order to resolve these important questions of law and policy.

Respectfully submitted,

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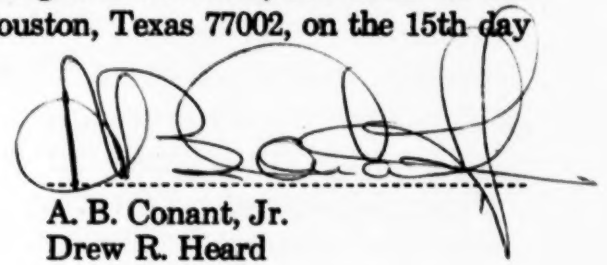
## CERTIFICATE OF SERVICE

We, A. B. Conant, Jr., and Drew R. Heard, members of the Bar of the Supreme Court of the United States, do hereby enter our appearance in this cause on behalf of Petitioners, Nelson Bunker Hunt, Herbert Hunt, and Lamar Hunt.

In accordance with Rule 33 of the Rules of the Supreme Court of the United States, the undersigned hereby certifies that three (3) copies of the foregoing Petition for Writ of Certiorari have been served on Mr. Dan Matthews, counsel for Respondents, Coastal States Gas Producing Company, and Coastal States Marketing, Inc., by depositing the same in a United States post office, with first class postage prepaid, addressed to Fulbright & Jaworski, 800 Bank of the Southwest Building, Houston, Texas 77002, on the 15th day of October, 1979.



A. B. Conant, Jr.
Drew R. Heard